

CANADA / JUDGMENT

1182604 B.C. Ltd. v. Orak Contracting Ltd.

2020 BCSC 2229

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 2229 1182604 B.C. Ltd. v. Orak Contracting Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1182604 B.C. Ltd. v. Orak Contracting Ltd.,

2020 BCSC 2229

Date: 20200305

Docket: S58349

Registry: Kamloops

Between:

1182604 B.C. Ltd.

Petitioner

And

Orak Contracting Ltd.

Karo Stein

Respondents

Before: The Honourable Madam Justice Donegan

Oral Reasons for Judgment

Counsel for the Petitioner (appearing by teleconference):

C. Cheng

Counsel for the Respondents:

D. Buchanan

No other appearances

Place and Date of Hearing:

Kamloops, B.C.

February 7, 2020

Place and Date of Judgment:

Kamloops, B.C.

March 5, 2020

Introduction

- [1] The petitioner seeks to cancel a claim of lien filed by the respondents or, alternatively, to have the claim of lien removed by posting security.

Factual Background

- [2] The petitioner, 1182604 B.C. Ltd. ("604"), currently owns three adjoining vacant lots in downtown Kamloops located at 612 Victoria Street - Lot A, Lot 21 and Lot 22 (collectively, the "Properties"). 604 is looking to consolidate the Properties into a single parcel for the purpose of the multi-use development project. Its efforts to do so have stalled as the result of a lien registered against the Properties by the respondents on October 1, 2019, which prevents it from obtaining a completed development permit.
- [3] 604 has owned Lots 21 and 22 since October 2018. It later acquired Lot A from Kaktus Flats Development Ltd. ("Kaktus"). Kaktus and 604 are closely related in that the CEO of Kaktus is Mel Laffrenere and its sole director is his son, Ryan. Ryan Laffrenere is also the sole director of 604.
- [4] In 2018, Kaktus began work on a development project which would see the demolition of the existing buildings located on the Properties. To advance the project, Mel Laffrenere retained the personal respondent, Karo Stein, a project manager in the construction industry who does business through the corporate respondent in these proceedings, Orak Contracting Ltd. ("Orak").
- [5] In November 2018, Mel Laffrenere and Mr. Stein reached an agreement to have Orak manage the construction of the new building on the Properties. The parties have a fundamental disagreement about the form and terms of their agreement, but for the purposes of this application, the petitioner is prepared to accept the facts asserted by the respondents. As counsel quite properly point out, this is not the forum in which to resolve these issues. Nevertheless, I will outline the areas of disagreement in this background for complete context.

- [6] Mel Laffrenere deposes that the agreement for Orak's services was an oral agreement that Kaktus would pay Orak \$10,000 per month for Mr. Stein's work on the project commencing in January 2019. Mr. Stein deposes that their agreement was reduced to writing and its terms required Kaktus to pay Orak for its services in managing the construction of the building as follows:
- a) a Basic Management Fee of \$12,000 per month plus GST (the "Basic Management Fee");
 - b) an Additional Management Fee of \$500,000 (the "Additional Management Fee") payable as follows:
 - i. \$10,416.66 per month plus GST until the Additional Management Fee is paid in full; and
 - ii. on the earlier of substantial completion of the building or termination of the agreement, the balance of the Additional Management Fee not otherwise paid.
- (the "Written Agreement")
- [7] Kaktus denies the existence of the Written Agreement and asserts that the signature appearing on it on behalf of Kaktus is a forgery.
- [8] In any event, Mr. Stein started working on this project in either November 2018 or January 2019. The parties disagree on the start date as well. The overall budget for construction was estimated to be over \$19 million and the estimated timeline for completion was about two years.
- [9] In January 2019, Mr. Stein obtained a demolition permit for the largest of the buildings and, by April of 2019, the demolition of all three buildings on all three lots was complete. Mr. Stein then arranged for the site to be graded, which was completed in about May 2019. No further work has been done on the Properties since then.
- [10] Mr. Stein continued to provide project management services from May until August 2019, including developing quantities for materials for construction, sourcing the materials for construction, revising the project budget for construction, sourcing materials and equipment for shoring the planned excavation, and meeting with architects and engineers in order to initiate revisions to the construction drawings. He attended the site project on a regular basis during this timeframe to meet with the contractor and reinstate security fencing.
- [11] To the point that Mr. Stein stopped working on the project in August 2019, Kaktus had paid him \$30,000 (\$10,000 in February 2019 and two \$10,000 payments in March 2019 for a total of \$30,000).

[12] Funding issues stalled the project so, in about August 2019, Mr. Stein arranged a meeting between Kaktus and representatives of Stoni Consolidated Holdings ("Stoni"), with a view to obtaining additional investment to allow the project to continue. Kaktus and Stoni subsequently entered into a joint venture partnership to construct the building. The partnership is called Stoni Flats.

[13] On August 31, 2019, Orak issued an invoice to Kaktus in the total amount of \$617,352.87 (the "Invoice") comprised of:

Management Labour 9 Months @12000

\$108,000.00

Expenses \$3,102

\$3,102

Minus paid to date -\$30,000

\$-30,000

Outstanding interest on moneys owed

\$6,853.12

As per Construction management agreement Dated Nov 21 2018

Price and payment a(ii)

\$500,00

Subtotal

\$587,955.12

Sales Tax

29,397.75

Total

617,352.87

[14] Kaktus disputes that it owes Orak these funds.

[15] Orak and Stoni Flats engaged in negotiations in the fall of 2019 in an effort to have Mr. Stein and Orak continue to be involved in the project, but because of the unresolved dispute with Kaktus over his unpaid fees, Mr. Stein refused to enter into a new construction management agreement with Stoni Flats.

- [16] On September 30, 2019, Mr. Stein registered a claim of builder's lien against title to the Properties under registration number LB568483 in respect of the monies he claimed to be owed under the Invoice (the "First Lien").
- [17] Mr. Stein did not have the benefit of legal advice in preparing the First Lien and it suffered from a few deficiencies, such as incorrectly identifying the debtor and creditor and identifying the incorrect date the alleged debt was due. When Mr. Stein learned of these errors, he registered a second lien on October 1, 2019, on behalf of Orak, against title to the Properties under registration number LB568484 in respect of the monies alleged to be owed to Orak (the "Second Lien"). He claimed the whole of the Additional Management Fee in the liens because, by about September 30, 2019, Orak believed that Kaktus had repudiated or terminated the Written Agreement, thereby triggering the obligation to pay the remainder of the Additional Management Fee under the Written Agreement.
- [18] On or about October 1, 2019, Kaktus paid Orak \$10,000, the amount it believed was owing. Orak argues much more remains owing under the terms of the Written Agreement.
- [19] On November 19, 2019, Mel Laffrenere, on behalf of Kaktus, sent a letter to Mr. Stein acknowledging Orak's repudiations of their contract (although not material to this application, it is interesting that in this letter Mr. Laffrenere refers to the Written Agreement, specifically identifying it in the subject line of the letter and in the last paragraph, referring to the notice provision in s. 13 of the Written Agreement, the Written Agreement he now asserts is a forgery).
- [20] In any event, on November 22, 2019, counsel for the petitioner sent a demand letter to Orak and Mr. Stein demanding the First and Second Liens be discharged from title to the Properties no later than November 27, 2019.
- [21] Receiving no response, 604 filed its petition to the court on November 28, 2019. The respondents filed their response on December 10, 2019.
- [22] On December 12, 2019, Mr. Stein discharged the First Lien.
- [23] On January 20, 2020, 604 filed an amended petition in this proceeding. The respondents filed their response to amended petition on January 29, 2020.
- [24] I heard the petition very quickly thereafter, over the course of a day on Friday, February 7, 2020.

Issues

- [25] At the hearing, the petitioner focused on only two of its arguments in favour of cancelling the Second Lien - that it was filed out of time and that it does not pertain to a lienable interest.

Issue 1 - Time Limit

[26] The petitioner argues that the Second Lien was filed out of time and therefore should be set aside.

[27] Section 20 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA] governs the time limit for filing a lien. The relevant subsection in this case is s. 20(2), which provides:

- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
- (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

[28] The petitioner argues that s. 20(2)(b) applies. The respondents demolished buildings on the site and had it graded. The petitioner submits that these tasks were "improvements" that were "completed" in May 2019, which is greater than the 45 days before the filing of the lien.

[29] The respondents argue that the lien was filed within the requisite time limit. They submit that the "improvement" for the purpose of the BLA consists of the project as a whole and therefore, as the project is not yet complete, the 45-day time limit prescribed in the legislation has not yet even started to run.

[30] As set out in s. 1(1) of the BLA, "improvement" is defined as:

"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

[31] Section 1(3) of the BLA provides:

- (3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

[32] In *Carmel Pacific Enterprises Inc. v. Spirit Equestrian Centre Ltd.*, 2005 BCCA 266, Chief Justice Finch, as he then was, considered the interpretation of s. 20(2)(b). In this case, a contractor, Carmel Pacific Enterprises, had been retained to construct a residence. Carmel Pacific filed a lien on a property over 45 days after the residence had been "substantially completed and occupied". However, Carmel Pacific argued that the improvement had not been "completed" as work remained to be done under the construction management contract (such as the construction of a pool and completion of various other tasks). The chambers judge had concluded that the "improvement" was not complete as there were outstanding services under the contract and, therefore, the lien was filed within the time limit.

[33] In allowing the appeal and finding that the lien was filed outside of the time limit, Chief Justice Finch held at para. 17:

- [17] It is my respectful opinion that the learned chambers judge asked himself the wrong question. The issue under s. 20(2)(b) of the Act was whether the "improvement" had been "completed". The question was not whether the "contract" was completed. In so doing, the learned chambers judge misdirected himself on the law. The evidence was sufficient in my view to show that the improvement was completed more than 45 days before the lien was filed. The case does not turn on any conflicting evidence. The result is based on an error of law. [My emphasis.]
- [34] The respondents in the case at bar rely on *N.R. Excavating & Services Ltd. v. Mand*, 2013 BCSC 723 for the proposition that the "improvement" is the project as a whole, and not limited to preliminary site preparation. In *N.R. Excavating*, the company, JMT, was hired to complete excavation and site services work on a number of properties. Other contractors began their work on the properties shortly after JMT finished providing its services. Justice Verhoeven held that the "improvement" for the purposes of s. 20(2)(b) consisted of the construction of the dwellings on the properties, not merely the services performed by JMT. As a result, he held that the 45-day time limit had not begun to run until the dwellings were complete. At paras. 62-63, Verhoeven J. held:
- [62] In the circumstances of this case, it is insensible to view the relevant "improvement" as consisting of only the work performed by JMT. JMT's work and services formed an integral part of the construction of the dwellings in the development project. There would be no purpose in JMT's work without constructing the dwellings. JMT's contract was not for construction of a discrete functional improvement.
- [63] A rational, common sense interpretation of the meaning of "improvement" in the circumstances of this case is that it refers either to the entire 27 residence project, or, as a minimum, to the individual clusters. On either interpretation, there was no head contract in this case, as the owners contracted with JMT and other contractors directly to perform various aspect of the work on the improvement.
- [35] Justice Verhoeven went on to find that where there is no head contract, the time for filing a lien under s. 20(2)(b) depends on "completion or abandonment of the improvement, not the contractor's contract with the owner": para. 66. Justice Verhoeven relied on *Carmel Pacific*, stating that the relevant "improvement" was the residences, rather than the completion of the contract.
- [36] In *Indy Electrical Ltd. v. Warn*, 2013 BCSC 2188, the plaintiff was hired by another company to complete electrical work at the home of the defendants. After completing most of its work, Indy Electrical issued an invoice and the City of Burnaby issued an electrical final certificate. Indy Electrical subsequently filed a lien on the property. In determining whether the lien had been filed within the 45-day time limit prescribed in s. 20(2), Chief Justice Hinkson, citing *Carmel Pacific*, stated that it is "the date of completion of the improvement, not the completion of the contract in question, that is the starting date under s. 20(2)(b)": para. 19.

- [37] The Chief Justice found that there was work ongoing on the property, subsequent to the issuance of the invoice and certificate, which bolstered Indy Electrical's argument that the improvement was not substantially complete before that time: para. 20.
- [38] It is unclear from the case whether the "ongoing work" were the final tasks required to be done by Indy Electrical or work done by other contractors. However, given that Indy Electrical had completed the majority of its electrical work, it appears that the court's finding that the improvement was "not substantially complete" before that time was in reference to the completion of the residence.
- [39] In the case at bar, the petitioner retained the respondents to manage the construction of a building on the Properties. In my opinion, the case law supports a finding that the "improvement" in this case is the construction of the building as a whole. While the demolition and grading were done greater than 45 days before the filing of the lien, the "improvement", I find, for the purposes of the statute has not yet been completed. As a result, I find the respondents filed the Second Lien within the time limit prescribed by s. 20(2) of the BLA.

Issue 2 - Lienable Interest

- [40] The petitioner argues that the "managerial services" performed by the respondents do not constitute "work" or "services" which create a lienable interest under the BLA. In considering this issue and the work performed, I have taken into account the affidavit evidence of the parties and the written contract. While there is disagreement as to whether the parties formed a valid contract, the various affidavits provide some insight into the arrangement.

- [41] Section 2 of the BLA sets out the circumstances in which a person may file a lien:

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
- (e) the improvement itself;
- (f) the land in, on or under which the improvement is located;
- (g) the material delivered to or placed on the land.

- (2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

[42] A "contactor" is defined in s. 1(1) of the BLA as follows:

"contractor" means a person engaged by an owner to do one or more of the following in relation to an improvement:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker;

[43] A "worker" is also defined:

"worker" means an individual engaged by an owner, contractor or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

[44] The term "work" means "work, labour or services, skilled or unskilled, on an improvement": s. 1(1);

[45] The term "services" is also defined as:

"services" includes

(a) services as an architect or engineer whether provided before or after the construction of an improvement has begun, and

(b) the rental of equipment, with an operator, for use in making an improvement;

[46] The interpretation of s. 2 and the circumstances in which a party may file a lien were considered by the Court of Appeal in *Northern Thunderbird Air Ltd. v. Royal Oak & Kerness Mines Inc.*, 2002 BCCA 58. In this case, an air carrier who provided transportation of construction workers and their baggage to a construction site sought a builders' lien. With respect to s. 2 of the BLA, Chief Justice Finch, writing for the Court, held:

[16] If one strips s.2(1) to its essentials, and substitutes for the defined words the definitions contained in s.1, s.2(1) would read this way:

A person engaged by an owner to provide a service in relation to any physical improvement attached to or intended to become part of the land has a lien for the price of the unpaid service on

[17] In construing the section, the definition of "services" which specifically includes those provided by an architect or engineer and the rental of equipment with operator, must be kept in mind.

[Emphasis in original.]

- [47] The Court held that the phrase "in relation to" in s. 2 must be considered in the context of the entire statute. The phrase is capable of a very broad meaning, but should not be given the widest possible meaning in every case: para. 40.
- [48] At para. 44, Chief Justice Finch discussed the ruling in *John Perkins/Peter Wardle Partnership v. Domus Design Company Ltd.* (1984), 51 B.C.L.R. 56 (C.A.). In *John Perkins*, the Court cited a decision of the Alberta Court of Appeal distinguishing development work from work that was "an integral and necessary part of the actual physical construction of the project." Despite noting the difference in legislation, the Court in *John Perkins* adopted the "necessary and integral" limitation, holding that there must be a direct relation between the services and the improvement to establish entitlement to a lien: at 369.
- [49] Chief Justice Finch found that the limitation requiring the work or services to be "an integral and necessary part" of the project is appropriate in the context of the statute as a whole, as the entitlement section imposes a corresponding limit on the rights of owners and other creditors: para. 43.
- [50] Chief Justice Finch went on to note that the majority in *Kettle Valley Contractors v. Cariboo Paving* (1986), 1 B.C.L.R. (2d) 236 (C.A.) similarly adopted the "necessary and integral" limitation, meaning that work done offsite may create an entitlement to a lien "provided it physically contributed in a direct and essential way to the construction of an improvement on the site": *Kettle Valley Contractors* at p. 256.
- [51] Chief Justice Finch went on:
- [48] It seems to me that in order to achieve the purposes of preventing owners from getting the benefit of buildings erected and work done at the expense of those who provided the materials and did the work, and of protecting the suppliers and workers by giving them a security interest in the owners land, the words "in relation to" must be limited in some way. This may be done by either requiring a direct relationship between the service and the improvement as in this case, or by requiring that the work or service be an "integral and necessary part of the actual physical construction". Otherwise, anyone who provided a service which indirectly benefited the improvement would be entitled to a lien at the expense of those who made direct contributions, as well as at the expense of other creditors with no security, statutory or otherwise. [My emphasis.]
- [52] Chief Justice Finch then discussed the meaning of "services." He noted the addition of the definition of "services" in a 1997 enactment and adopted a narrow interpretation of the term:
- [54] it seems to me the addition of the present definition of services to the was intended to remedy the uncertainty that previously existed with respect to the three types of services identified in the definition. It may well be, as counsel for the plaintiff contends, that that goal could have been achieved without resorting to the "inclusive" definition of services. However, viewed against the history of builders' lien litigation involving architects, a reasonable interpretation of the definition, in a statute which affects property rights, would

be to limit the definition to those services specifically identified as included, rather than read it as a limitless expansion of services that could come within its meaning. [My emphasis.]

- [53] In other words, the definition of "services" is limited to architectural and engineering services and equipment rentals. The Court ultimately held that the air carrier was not entitled to a lien in the circumstances and stated:
- [56] I conclude that the phrase "in relation to" in s.2(1) and in the definition of contractor is to be read as meaning "in direct relation to", or "in relation to an integral part of the improvement", and that the definition of "services" is not to be read as limitless, despite its inclusive nature. Rather, it is to be read as remedial, to include those specified services whose inclusion might previously have been in doubt.
- [54] The respondents in the case at bar rely on the decision of *Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2002 BCCA 357. The main issue on appeal was the extent to which the BLA protected architects and engineers which required interpreting the meaning of "services" within the Act.
- [55] In that case, a number of parties were hired to provided services for the construction of a pub. The pub was not built, but a number of tasks were carried out. Chaston Construction Corporation ("Chaston") had completed pre-construction services.
- [56] Justice Rowles, writing for the Court, quoted from the portion of the trial decision setting out those services at para. 13:
- [13] The trial judge described the work referred to in the correspondence with Boehnke, the fee arrangement, and the work actually done by Chaston as follows:
- [5] By letter of January 13, 1999, Chaston wrote to Boehnke, offering to "provide construction management services to provide assistance during the design phase and to contract and oversee all of the construction " of the brew pub, for a fee of \$85,000. By letter to Boehnke of January 22, 1999, Chaston provided a more complete description of the services it offered. In summary form Chaston offered services under a number of headings which I summarize as follows:

Design Phase

Under this heading, Chaston promised to work with the architect and sub-consultants to make sure that they had a complete design.

Budgeting

Chaston offered to produce a series of budgets during the period of obtaining bids from sub-contractors, fine tuning the budget items and ultimately negotiating the contracts.

Scheduling

Preparation and updating of a construction schedule was included.

Tendering/Letting of Sub-contracts

Chaston undertook to tender the entire project to the sub-trades and to let the contracts to the sub-contractors.

Supervision of the Work

Chaston was to supervise the onsite work.

Administration of the Contract

Chaston was to look after the administration of the sub-contracts.

Commissioning

Chaston was to oversee the hand-over of the project to the owner.

Deficiencies

Chaston was to ensure that all deficiencies were completed quickly.

Warranty

Chaston was to ensure that sub-contractors lived up to their warranty obligations.

- [6] Essentially, Chaston was to provide the services described in the contract and correspondence for a fee of \$75,000. A schedule of payments was incorporated, calling for monthly payments in varying amounts commencing April 15 and concluding October 15. Those payments totalled \$70,000. On completion, the final payment of \$5,000 was payable. If the project was substantially completed on time and on budget, an additional fee of \$10,000 was to be paid.
- [7] Chaston provided services to Manna from March 1999 until June 1999, at which time it says it had completed all the pre-construction services needed for the construction of the brew pub. Those pre-construction services included co-ordinating the design disciplines of architectural, mechanical and electrical services. Chaston also assisted Manna in retaining engineers and consultants, met with them and discussed the design of the brewery tanks, the refrigeration systems, the security systems, the computer equipment system and the kitchen equipment. It assisted them with preparation of drawings and plans and co-ordinated their services.
- [8] In order to ensure that the brew pub design was acceptable to Henderson, Chaston met with Henderson and with Kirkor Architects & Planners ("Kirkor"), the architects retained by Henderson. They also met with Forster and others. Chaston also attended on site on a number of occasions.

- [57] In that case, Chaston contended that "the definition of services under the Act creates a class of claimants with unique builders' lien rights and that architects and engineers are expressly afforded those rights for work performed prior to construction of an improvement, regardless of whether construction of the improvement ever actually commences."
- [58] The Court rejected Chaston's argument, finding that the definition of improvement was not intended to include the words "intended improvement": para. 52. The Court held that construction must have commenced before architects and engineers are entitled to claim builder's liens: para. 55. However, the Court ultimately found that bracing of floors, a preconstruction task which was carried out by another party but to which Chaston had contributed services, was work in relation to the improvement and therefore construction had commenced: para. 69. As a result, the Court held a lien may be filed.
- [59] A further issue was whether the trial judge erred in finding that the type of tasks performed by Chaston fell within the definition of "services" in the BLA. In affirming the trial judge's finding that the tasks were "services", the Court held that the BLA "does not stipulate that the services as an architect must be performed by a person recognized or accredited by a particular professional body or association and the definition is an inclusive one": para. 73.
- [60] At para. 74, the Court held the tasks carried out by Chaston, as canvassed by the trial judge, were "services" under the statute and created an entitlement to a lien:
- [74] The learned trial judge set out with considerable particularity the terms of the contract between Manna and Chaston as well as the services performed by Manna. There is no suggestion that his summary of the facts, most of which is set out earlier in these reasons, is inaccurate. A reasonable inference to be drawn from the evidence of the services Chaston was contractually bound to provide is that the services were very similar if not identical to services that architects and engineers commonly provide. [My emphasis.]
- [61] In *Harmony Co-Ordination Services Ltd. v. 542479 B.C. Ltd.* (1999), 64 B.C.L.R. (3d) 376 (S.C.), Justice Smith considered the meaning of "services as an architect or engineer".
- [62] In that case, the plaintiff had provided "multidisciplinary services". In determining whether the services fit the definition under the BLA, Justice Smith canvassed definitions of "architect" and "engineer" at para. 28:
- [28] The New Webster Encyclopedic Dictionary of The English Language defines "architect" as:
- A person skilled in the art and science of building; one who makes it his occupation to form plans and designs of buildings, and superintend their erection; a former or maker.
- It defines "engineer" as,
- Originally one who managed military engines or artillery; now one who manages an engine or has to do with the construction of engines and machinery; or a person skilled in the principles and practice of engineering, either civil or military.

- [63] The court concluded that the services provided by Harmony fell within those definitions: para. 29. As a result, Harmony was entitled to a lien. In considering the amount of the lien, the court went on to find that other services included within the "global amount were an integral part of Harmony's process": paras. 33-38. These services included work done by Harmony's receptionist, sales, and marketing.
- [64] In my view, the tasks provided by the respondents in the case at bar fit within the definition of "services." This is evident from a comparison of the tasks listed in Chaston Construction and those set out in the Amended Response to Petition and the affidavits before me. For instance, the respondents assisted in finalizing the design of the building, developing a budget, scheduling work, and supervising work. There was a direct relationship between the services provided by the respondents and the (incomplete) improvement, as required by Chief Justice Finch in Northern Thunderbird Air.
- [65] While construction of the building has not yet begun, construction of the improvement has commenced for the purposes of the BLA. The respondents were involved in organizing and supervising the demolition and grading of the land. These are preparatory tasks similar to the strengthening of the floor done in Chaston Construction. I am satisfied in the circumstances of this case and with the material before me that the respondents do have a lienable interest.
- [66] The petitioner relies on a number of case authorities in support of its position to the contrary, including two I will discuss here.
- [67] In *Elderly Citizens Recreation Association v. Loepply Consulting Ltd.* (1999), 45 C.L.R. (2d) 122 (B.C.S.C.), the petitioner applied to have a builder's lien set aside on the basis that the work or services provided did not entitle the respondent to a lien. The contract between the parties provided that the respondent would:
1. Conduct a project feasibility study
 2. Develop a project pro forma detailing tenure and purchase options
 3. Locate suitable site and negotiate it's acquisition
 4. Arrange for capital financing
 5. Co-ordinate municipal approvals
 6. Co-ordinate CMHC approvals
 7. Draft, review, negotiate all contracts as applicable
 8. Co-ordinate documentation for first mortgage advance
 9. Submit monthly advance claims
 10. Co-ordinate capital cost close-out

11. Co-ordinate marketing program

(collectively called the "Services").

- [68] In those circumstances, Justice Boyle found that the respondent was not entitled to a lien, holding at paras. 27-28:
- [27] The Act has the effect of separating promotional development of the kind the respondent undertook from site planning and preparation and from construction.
- [28] Because certain creditors are given statutory protection they would not have at common law, the court must cleave closely to the narrow view, the narrow view of "physical construction".
- [69] The petitioner also relies on *Tuscany Village Holdings Ltd. v. Conquest Development Corporation*, 2005 BCSC 1392, where Justice Burnyeat considered whether a party was entitled to a lien for "executive services." There, the court described that the defendant had performed:
- [26] functions that a developer might undertake, including arranging for financing, dealing with real estate agents, meeting with the bankers, investors, lawyers, attending public meetings, arranging for press releases and organizing "ground-breaking" ceremonies, and performing "executive services".
- [70] Justice Burnyeat held that these services were not an integral and necessary part of the physical construction of the project and were, therefore, not lienable: para. 27.
- [71] I see the tasks performed in *Elderly Citizen Recreation* and *Tuscany Village Holdings* as quite different from those carried out by the respondents in the case at bar. In *Elderly Citizens*, the respondent carried out tasks that were related to financing the project. They were not directly related to construction. In *Tuscany Village*, the services provided were financial and promotional in nature. As noted by Justice Boyle in *Elderly Citizen*, the BLA has the effect of separating promotional work from site planning and preparation and from construction: para. 27.
- [72] In the case at bar, the respondents' work, I find, went beyond merely obtaining financing or promoting the project. Rather, the respondents were involved in tasks that were directly related to the construction of the project. I find in favour of the respondents on this issue.

Issue 3 - Posting of Security

- [73] The petitioner argues that if the Second Lien is not cancelled for either of the two reasons it has advanced, that it should be cancelled on the posting of appropriate security. The respondents agree with this position; however, they disagree on the appropriate amount to be posted.

- [74] The petitioner provided a number of calculations based on different start and end dates and fee rates depending on whether the oral agreement or the Written Agreement governs the parties' relationship and depending on when the respondents started and ended their work on the project. In its amended petition, the petitioner pled that either \$8,000 or, alternatively, \$68,000 be posted. At the hearing, the petitioner's position was that as low as \$10,000 ought to be posted, but it does allow for an upper end of \$161,749.94 to be posted.
- [75] The respondents also provided a calculation based upon the terms of the Written Agreement which includes the basic fee of \$12,000 per month for nine months' work, the additional fee of \$10,416.66 for nine months' work. That totals \$93,749.94 plus GST at five percent in the amount of \$10,087.50 plus expenses of \$3,102 for a total of \$174,939.44. That is the amount the respondents say ought to be posted.
- [76] Section 24 of the BLA governs. It provides:
- 24 (1)A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.
- (2)The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
- (3)The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
- (4)The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.
- (5)The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.
- [77] In *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172, the Court considered the interpretation of s. 24 of the BLA and the test for determining sufficient security. It held that the inquiry under s. 24 should be approached with caution:
- [23] in order to "avoid injustice to lien claimants who, generally speaking, have the right to have their claims fully adjudicated at trial": *West Fraser Mills* at para. 40. The judge has discretion to fix the amount, but that discretion should be exercised with due caution; the s. 24 analysis is not an adjudication on the merits: *Q West Van Homes* at paras. 39-42.
- [78] The Court went on in to discuss the two-part test that it had established in *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366:
- [26] The decision of this Court in *Q West Van Homes* establishes a two-part test. The Court said:

- [56] Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:
- the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;
 - any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
 - looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
 - that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
 - the amount of security may be less than the amount claimed under the lien.
- [79] The first stage is an "examination of the claim". The focus at this stage is whether a lien claim or a component of the lien claim is "bound to fail". The burden is on the party seeking to reduce the amount of security posted to show that there is no prospect that the claim or the component of the claim will succeed: *Centura Building Systems* at para. 30.
- [80] If the lien meets the first part of the test, the second stage of the analysis requires the court to look at the evidence as a whole to determine whether the security should be reduced. However, the Court held that courts "should be cautious in ordering a reduced amount of security". Caution ought to be exercised in favour of the lien claimant at this stage: *Centura Building Systems* at para. 34, citing *Q West Van Homes*.
- [81] I find the petitioner has not met its burden under either step of this test.
- [82] In *M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd.*, 2005 BCSC 1375, Justice Johnston stated that claims for work performed or provided or materials supplied may be subject to a lien provided they are "so closely connected to [the claims] that it is reasonable and proper that they should be included in the statutory regime under the Builders Lien Act" para. 57. In my view, the respondents' claims for unpaid fees, GST, and expenses meet this requirement.
- [83] At this point, the parties are in disagreement about the fee rate and the length of time that the respondents performed services for the petitioner. The parties have advanced conflicting evidence, including a written contract which may or may not have been validly executed. Although the petitioner advanced expert evidence that the signature of Ryan Laffrenere on the contract was forged, I am of the opinion (as they concede), this evidence does not assist me in determining relevant issues here. Regardless of whether the signature was forged or not, the agreed-upon fee schedule and the start date of the contract remain unclear.

[84] Given that I must exercise caution in favour of the lien claimant at this stage, and in light of the conflicting evidence advanced, it is my view that the amount put forward by the respondents as security (\$174,939.44) is appropriate in this case.

[85] Accordingly, the claim of lien filed by Orak under registration number LB568484 in the Kamloops Land Title Office, the Second Lien, is cancelled on the posting of security in that amount, again, \$174,939.44, by the petitioner.

[DISCUSSION ON COSTS SUBMISSIONS]

[86] THE COURT: Very good. With respect to the issue of costs, then, if the parties are unable to agree, they may make arrangements through Supreme Court Scheduling to either bring the matter back before me for an oral hearing, or to provide written submissions on a timetable of counsel's choosing, but incorporating an outside time limit of 90 days.

[87] If you do agree on costs, you can incorporate your agreement into the form of the order. Thank you both very much for your thoughtful and thorough presentations.

DONEGAN J.

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